

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION
3 HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE
4

5 UNITED STATES OF AMERICA,)
6 Plaintiff,) **CERTIFIED TRANSCRIPT**
7 vs.)
8 JOSEPH MARTIN GOVEY,) Case No.
9 Defendant.) 8:17-cr-00103-CJC-1
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14 REPORTER'S TRANSCRIPT OF
15 DAUBERT HEARING
16 TUESDAY, FEBRUARY 13, 2018
17 9:01 A.M.
18 SANTA ANA, CALIFORNIA
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1 **SANTA ANA, CALIFORNIA; TUESDAY, FEBRUARY 13, 2018**

2 **9:01 A.M.**

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4 THE COURTROOM DEPUTY: Calling Item No. 1,
09:01AM 5 SACR 17-103, United States of America versus Govey.

6 Counsel, please state your appearances.

7 MR. MARRETT: Good morning, Your Honor. Brad
8 Marrett for the United States. And with me at counsel table is
9 AUSA Gina Kong.

09:01AM 10 THE COURT: Good morning.

11 MS. KONG: Good morning.

12 MR. SCOTT: Good morning, Your Honor. Tim Scott for
13 Mr. Govey. He's present before the Court in custody. We also
14 have a proposed defense expert, Arthur Fayer, who is outside in
09:01AM 15 the witness room.

16 THE COURT: Very well. Good morning, gentlemen.

17 All right. Well, the purpose of this hearing is to have a
18 *Daubert* hearing on both sides' experts, so why don't we start
19 with government's expert first.

09:01AM 20 MR. MARRETT: That's fine, Your Honor.

21 MR. SCOTT: Actually, if I can, and if the answer is
22 "no," the answer is "no." Mr. Fayer is in the middle of a
23 murder trial in San Diego, they went dark this morning. I told
24 him I would ask if we could put him on first so he can make his
09:02AM 25 way back down there. If that's not okay, that's not okay, but

1 I thought I would at least ask if that's all the same to the
2 Court and the government.

3 THE COURT: Any objection from the government?

4 MR. MARRETT: I haven't spoken with Special Agent
09:02AM 5 Paris to see if he has time commitments. I know we anticipated
6 with him going this morning. I just need to check with him to
7 make sure that there's no conflict.

8 THE COURT: That sounds fair. Thank you.

9 **(Pause in proceedings.)**

09:02AM 10 MR. MARRETT: I have no objection to that.

11 THE COURT: All right. Before we do get started,
12 again, I'm keeping a very open mind, but just going to be
13 candid and transparent, I wasn't convinced that we needed this
14 hearing for both sides' experts. I was hoping and optimistic
09:03AM 15 that both sides would work it out. It would just seem to me in
16 this type of case that it would be fair game for both sides'
17 experts to talk about the practices and methods of drug
18 distribution including packaging and quantities. Quantities
19 that are typically -- that they've seen in distribution and
09:03AM 20 then what they think is, in their opinion based on their
21 experience, an amount for personal use.

22 It would be inappropriate, like I indicated before, for
23 the expert to start summarizing the evidence that was seized in
24 this case, and to indicate whether Mr. Govey had the drugs for
09:04AM 25 personal use or for distribution. That's an issue for the

1 jury. And I just think it's an improper opinion, not helpful
2 to the trier of fact under 702. It's not the 704 ultimate
3 issue that I'm talking about.

09:04AM 4 So I think the case law is pretty clear that it would be a
5 denial of due process to prevent either side from putting on
6 that type of expert testimony. The average citizen juror is
7 not familiar with distribution practices and methods. And if
8 someone has extensive experience in this area, I don't see why
9 a problem is here. If -- and so I -- I'm a little bit at a
09:05AM 10 loss why we're having this hearing for both experts in this
11 type of case.

12 MR. MARRETT: Well, and -- take the lectern, Your
13 Honor.

14 So my understanding is that the scope of the testimony
09:05AM 15 that you're suggesting, I think, is what certainly we're
16 contemplating our expert testifying to. And I would anticipate
17 the defense expert to be sort of the reciprocal testimony of
18 that. And I think obviously what's good for the government is
19 good for the defense as far as the proper opinions being
09:05AM 20 offered.

21 My understanding is that the defense's objection is to --
22 and I'm sure Mr. Scott will correct me if I'm wrong -- is to a
23 particular piece of testimony that has come up in prior cases
24 where the government's expert has testified. I don't
09:05AM 25 anticipate offering that testimony here, and so I don't think

1 that there is an issue really to be addressed.

2 There is one issue with the defense expert that I did want
3 to explore, at least raise with the Court, and that is the
4 defense expert has, in my understanding, testified previously
09:06AM 5 to when he's talking about personal use, amounts of users to
6 this bell curve analogy, and I think that the bell curve
7 analogy, that language is unduly prejudicial, because my
8 understanding is there hasn't been actually statistical
9 analysis done or any rigorous modeling of data.

09:06AM 10 And so to suggest to the jury that there is this bell
11 curve, which I think would resonate with the jurors' minds in
12 some sort of statistical analysis would be unfairly
13 prejudicial. I think he can testify to all the same opinions
14 but without sort of putting it into this box of suggesting to
09:06AM 15 the jury that there's an underlying statistical analysis.

16 That's the only concern that I wanted to raise with the
17 defense expert's testimony. And I'll let Mr. Scott address
18 that if perhaps that's not the testimony that he's anticipating
19 the expert to offer.

09:07AM 20 THE COURT: All right. Mr. Scott.

21 MR. SCOTT: Your Honor, I might just be fast if we
22 just put it on quickly. I'm mindful of the Court's guidance,
23 and I think we can do this fairly efficiently.

24 THE COURT: Okay. All right. Let's do it.

09:07AM 25 MR. SCOTT: Thank you, Your Honor.

1 MR. MARRETT: Are you going to allow defense counsel
2 do some direct examination first, Your Honor?

3 THE COURT: Yes.

4 Hello, sir. If you could please come forward. Stand
09:07AM 5 right by the court reporter for a moment. We're going to
6 administer an oath and have you take the witness stand.

7 **ARTHUR FAYER, DEFENSE WITNESS, WAS SWORN**

8 THE COURT: For purposes of efficiency, Mr. Scott,
9 if you want to lead, particularly on qualifications and
09:08AM 10 experience.

11 MR. SCOTT: Excellent, Your Honor. Thank you.

12 THE COURTROOM DEPUTY: Please state your appearance
13 and spell your last name.

14 THE WITNESS: Arthur Fayer, F-a-y-e-r.

09:08AM 15 **DIRECT EXAMINATION**

16 BY MR. SCOTT:

17 Q Mr. Fayer, good morning.

18 A Good morning.

19 Q I will accept the Court's invitation and ask a couple
09:08AM 20 leading questions to get us started here.

21 I asked you whether you would be willing to serve as a
22 potential expert in this case and to render an opinion or
23 opinions in this case; is that right?

24 A Correct.

09:08AM 25 Q And specifically I was interested in you coming to court

1 and sharing with the judge and potentially the jury based on
2 your own training and experience the sort of ranges of daily
3 consumption of methamphetamine that one might expect to see
4 from regular methamphetamine users. Is that a fair summary of
09:09AM 5 what you and I have discussed thus far?

6 A Yes, sir, it is.

7 Q Okay. So just in the name of efficiency, why don't I ask
8 you first for that opinion, and then I will circle back and ask
9 you about your background and qualifications. Does that make
09:09AM 10 sense?

11 A Yes.

12 Q Okay. So what would your testimony be in -- again, in
13 summary, as to what we could expect to see in terms of the
14 personal consumption of methamphetamine for regular users?

09:09AM 15 A It ranges widely. We're all different. And typically we,
16 in the profession of substance abuse treatment, we talk about a
17 first-time user, an experimental user, recreational user, a
18 sort of habitual user, problem user, and then what we use to
19 call addicted or substance dependent person.

09:10AM 20 So in that range it starts off -- I'm sorry, in my
21 experience, nowadays if you've never done it before, there's a
22 unit of dosage called a party dose, a tenth of a gram that's
23 commonly seen as a small, thin line, for example, if they're
24 inhaling it. And it ranges from that experimental or
09:10AM 25 first-time user to, in my experience, as much as a half an

1 ounce as much as -- that would be 14 grams, 14.15 grams in a
2 day, that much.

3 An average user, if you look at a bell curve, whether
4 there's two tails at either end, bell curve is describing a
09:11AM 5 picture of a bell, in the middle it would be nowadays one to
6 two, two-and-a-half, maybe more grams per day. And the heavy
7 user would be closer to three to five grams on average
8 nowadays. And the outliers weigh on the far end of heavy using
9 half an ounce or such enormous numbers.

09:11AM 10 Q All right. Well, let me stop you there and unpack that
11 briefly. You described kind of on one end of the spectrum what
12 you described as a recreational or first-time user; is that
13 right?

14 A Correct.

09:11AM 15 Q So when you -- and I think you mentioned a number
16 one-tenth of a gram?

17 A Correct.

18 Q So if I understood your testimony, one-tenth of a gram
19 could be a single dosage or single use of methamphetamine, but
09:12AM 20 that would typically be in the context of kind of a first-time
21 experimenter or first-time recreational user of
22 methamphetamine. Did I state that correctly?

23 A Correct.

24 Q Now you said a half ounce or using up to 14 grams a day.
09:12AM 25 Is it fair to say that that, at least in your experience, is

1 not common, is not sort of the average use that you have seen?

2 A It is not.

3 Q So that's kind of like an extreme -- I don't know about
4 extreme, but that's kind of an outlier, that's on the other end
09:12AM 5 of the spectrum in terms of daily use?

6 A Correct. Yeah, I would say it is extreme, yes.

7 Q Okay. So just so we're clear, I want you to envision
8 sort of a regular user, somebody who's using methamphetamine on
9 even a daily basis. What did you say as sort of the -- you
09:12AM 10 would expect to be typical or average, if there is such a
11 thing, daily usage of methamphetamine, assuming somebody is
12 using it every day?

13 A Right, which many users do consume daily. It's the nature
14 of the drug. If one is good, two is better. So it leads, of
09:13AM 15 course, to what we would call addictive behavior using daily.
16 And I earlier said one to three grams, but closer to two grams
17 for a regular user who's still appearing to function in
18 society, two to three grams, in that area.

19 Q That's each day?

09:13AM 20 A Yeah. Every day, over and over.

21 Q And what about setting aside sort of the half ounce
22 outlier, what about a thoroughly addicted heavy user, what
23 would be sort of the heartland of daily use in that scenario?

24 A Three to five grams per day.

09:13AM 25 Q Okay. Now you used the term "bell curve" and kind of

1 traced that with your hands and, you know, show the tail on
2 each side. Just to be clear, have you done some sort of formal
3 statistical analysis in terms of, you know, daily usage, or are
4 you using the term "bell curve" more colloquially to talk about
09:14AM 5 the heartland of your experience?

6 A Colloquially I would say in the sense that for this
7 discussion -- or in my professional career, I've not done that
8 statistical analysis. Although I did take Statistics 1 in
9 college.

09:14AM 10 Q Okay. So you're not trying to dress this up with any
11 particular extra scientific filigree, this is more just trying
12 to communicate kind of the averages that you've seen in your
13 experience?

14 A Yes.

09:14AM 15 Q Okay. So let's circle back around now. What can you
16 share with us in terms of your work experience that enables you
17 to share the opinions that you've just shared with us this
18 morning?

19 A I've been working in the field -- for some reason I'm
09:14AM 20 sliding out of this chair -- I've been working in the field for
21 close to 31 years. Coming up on 31 years.

22 Q When you say "the field," what field is that?

23 A Substance abuse, dependence treatment and --

24 Q All right.

09:15AM 25 A -- program management.

1 Q So going back 31 years, what was -- how did you break
2 into the field so to speak?

3 A I actually broke into it by accident. I was on probation,
4 and I was asked by my probation officer to come and share my
09:15AM 5 experience from early recovery with one of her probationers,
6 and that continued for a while. And it led me to going to
7 school. And while I was in school, I continued working with
8 the San Francisco Probation Department unpaid. I graduated
9 and -- no, I didn't complete. That was a master's program. I
09:15AM 10 did not complete it. I got hired by UCSD. I was headhunted, I
11 guess, is the phrase we use.

12 So I moved here, San Diego, 30 -- just about 31-and-a-half
13 years ago and went to work. No, 30 years ago, 30-and-a-half
14 years ago, I'm sorry, to work at UCSD as a counselor,
09:16AM 15 drug/alcohol counselor for students in trouble and as an
16 instructor in their DUI program. So that was my first job.

17 Q So let me stop you there. I was going to get into this
18 later, but you sort of touched upon it.

19 Do you have some personal experience in your life that
09:16AM 20 helps to inform and color your views and opinions that you're
21 offering here?

22 A I do. I'm a recovering addict, the way we phrase it. I'm
23 coming up on 34 years clean and sober if I make it in March,
24 another -- a little less than a month from now. And I became
09:16AM 25 addicted first to marijuana while I was in law school, last

1 year of law school and never took the bar exam. And continued
2 using drugs, continuing -- as we all know about the continuing
3 increasing use and drug behavior for 20 -- just under 24 years.
4 And I was arrested and convicted in San Francisco in 1984,
09:17AM 5 June. I've been clean since March of '84, clean and sober.
6 That led to my recovery. But the addiction was severe and long
7 lasting.

8 Q And as your experiences both in addiction and in
9 sobriety, is that part of your experience in this matter?

09:17AM 10 A Correct. It would, therefore, be over 50 years.

11 Q All right. So you said after you became sober, you
12 obtained a job at UCSD as a drug and alcohol counselor?

13 A Correct.

14 Q Is that for the college students that were either at risk
09:17AM 15 or suffering from substance abuse issues?

16 A Correct.

17 Q All right. Take us forward, then, after UCSD in terms of
18 work experience.

19 A I then went to work after a few years at McAlister
09:17AM 20 Institute, which is a nonprofit large contractor with San Diego
21 County and Napa County now providing -- and that company
22 provides drug -- all kinds of drug services, rehab services. I
23 was hired to run the -- back then it was called drug diversion
24 program, now it's called DEOJ, Deferred Entry of Judgment.
09:18AM 25 It's present here in Orange County. It's a state-mandated

1 program; all counties provide some form of it.

2 And I ran that program for 23 years, 23-and-a-half years
3 as well -- during the time of working for this large company, I
4 became the director of their education. I provided all kinds
09:18AM 5 of education and training services. And finally, the last
6 three years was their director of all outpatient services.

7 Q In the context both of working at UCSD, McAlister, and as
8 executive for the Deferred Entry of Judgment program, various
9 court systems, did you do interviews with people who used drugs
09:19AM 10 on a daily basis?

11 A I did. I did about an hour-and-a-half-long assessment of
12 each person that entered the DEOJ program over those 23 years
13 that I was there.

14 Q As you sit here today, do you have a rough estimate of
09:19AM 15 how many people suffering from substance abuse that you've
16 interviewed over the years about their usage and habits?

17 A Well, I'd have to draw out the words "suffering from
18 substance abuse" because some of those participants weren't
19 suffering, they were in the wrong place at the wrong time,
09:19AM 20 which is what everybody says. But a few were -- I would say
21 over 16,000, 17,000 individuals. We got about 800 new people a
22 year, and I did all of the assessments.

23 Q All right. Do you have any certifications as it comes to
24 drug and alcohol counseling or expertise?

09:20AM 25 A Yes. In 1990 I completed the first year that it was

1 provided, CAS, called certification addiction specialist. It's
2 now been subsumed by what's called KDAC. But I never -- I
3 didn't have to do the extra work when that came, the governing
4 body. But CAS is what I am, which is a certified addiction
09:20AM 5 specialist. It was a six-month program provided by San Diego
6 County.

7 Q And do you provide training or education to other people
8 who are seeking to get certified in a similar fashion?

9 A I do. I provide trainings in several formats. Mostly I'm
09:20AM 10 hired by the County for drug/alcohol training for people
11 working in the profession of substance abuse. I also provide
12 CEU training credits for psychopharmacology and a few other
13 areas of the substance abuse spectrum.

14 Q Have you been admitted and accepted as an expert witness
09:21AM 15 in courts of law before?

16 A Yes, sir.

17 Q Rough estimate of how many times you've been recognized
18 as an expert?

19 A About 150 times.

09:21AM 20 Q All right. And that would include both state and federal
21 court on some occasions?

22 A Yes, I've been in federal court three times.

23 Q Okay. That's all I have at this time. Thank you.

24 THE COURT: Very well.

09:21AM 25 Mr. Marrett.

1 MR. MARRETT: May I proceed, Your Honor?

2 THE COURT: You may.

3 **CROSS-EXAMINATION**

4 BY MR. MARRETT:

09:21AM 5 Q Good morning, sir.

6 A Good morning.

7 Q You testified that you had interviewed I think it was
8 between 16- and 17,000 addicts over the course of your career;
9 is that right?

09:22AM 10 A No. I said that in terms of the course of employment with
11 McAlister Institute. I've done many more since then and at the
12 same time, but not with that employment.

13 Q Okay. Well, about how many have you done?

14 A I'm sorry?

09:22AM 15 Q About how many interviews have you done?

16 A Over 20,000.

17 Q And have those all been interviews of methamphetamine
18 users?

19 A No.

09:22AM 20 Q Approximately how many were of methamphetamine users?

21 A Hard to say exactly, of course. Half, maybe a bit more.
22 It's the dominant drug of choice in the field that I'm in.

23 Q And so when you interview these folks, you interview them
24 for about an hour and a half. Is that what you said?

09:23AM 25 A Yes, sir.

1 Q And you're interviewing them about their use habits?

2 A It's part of it, yes.

3 Q What other topics do you cover in that interview?

4 A Sorry?

09:23AM 5 Q What other topics do you cover in that interview?

6 A Thank you. It's basically eight different topics covering
7 their legal history, their substance abuse history, their
8 family life, education, employment, medical, psychological
9 issues that may or may not be present.

09:23AM 10 Q And so one of those topics is their use habits; right?

11 A Yes, sir.

12 Q And so of the -- about half of the 20,000 people that you
13 interviewed, how many of them told you that they used about a
14 gram a day?

09:23AM 15 A I don't have that number. But I would say that that would
16 be close to a majority or close to it, maybe 40 percent. But I
17 really -- I can't tell you accurately.

18 Q So you testified that a tenth of a gram is a party hit?

19 A Yes, I did.

09:24AM 20 Q How many of the folks that you interviewed told you that
21 they used a tenth of a gram a day?

22 A Almost none. They all said more than that. Typically I
23 did have some folks that were new to the experience of that
24 drug and they would do that tenth of a gram, and then they
09:24AM 25 would do several more in the course of a party.

1 Q In the course of a party, is that what you said?

2 A In the course -- yeah, during the time that evening, for
3 example.

4 Q Okay. And the people that were using the tenth of a gram
09:24AM 5 a day, were you seeing them in the context of these drug
6 diversion programs?

7 A Yes, sir.

8 Q So they had been arrested; is that right?

9 A That's correct.

09:24AM 10 Q And what was the typical quantity that they had been
11 arrested with?

12 A None sometimes. You mean in possession?

13 Q Well, they must -- I assume they were arrested for
14 possession?

09:25AM 15 A No. They could be arrested for under the influence.

16 Q Okay. So how many of the people arrested for possession
17 had a tenth of a gram quantity on them?

18 A None.

19 Q How many of the people arrested had a gram quantity on
09:25AM 20 them?

21 A That much or more. But I -- all of them. I don't have
22 exact number if they're arrested for possession. And a few
23 were arrested for possession -- more than a few for sale where
24 the Court has allowed them to take the program in the
09:25AM 25 furtherance of justice.

1 Q Now you mentioned somebody or sort of the extreme cases
2 of somebody that uses a half ounce a day; is that what you
3 said?

4 A I did.

09:25AM 5 Q How many individuals did you interview that used over a
6 half an ounce?

7 A Over 100.

8 Q So 100 people that you interviewed told you they used a
9 half ounce a day?

09:25AM 10 A Yes. And I join that number, again, without codification
11 or serious research, which would be semi-impossible since my
12 experience goes back so many years. We shred all documents
13 after four years. But a fair number. And I didn't even
14 mention there's a few and maybe five that have said an ounce a
09:26AM 15 day, which I find impossible, but...

16 Q So when somebody tells you that they use a half an ounce
17 or ounce a day, do you do anything to confirm what they're
18 telling you in these interviews?

19 A Good question. I don't in the sense that I question their
09:26AM 20 statement and ask them how they have the time to do that, and
21 they explain their method of use. As they're using, they spill
22 it. They tend to describe the behavior which strikes true to
23 me as someone that once did the same drug myself.

24 Q But there's nothing you do to confirm what they're
09:26AM 25 telling you?

1 A There's no way to do that.

2 Q Well, do you interview any of their friends?

3 A I'm sorry?

4 Q Do you interview any friends or family members?

09:26AM 5 A No, not -- I do sometimes nowadays in my current career
6 since I retired from McAlister Institute. I do sometimes, but
7 I don't talk to them about the quantity of use. I do sometimes
8 talk to family, yes.

9 Q So now, sir, you testified that you were using the term
09:27AM 10 "bell curve" to describe the distribution of individual users;
11 is that right?

12 A Yes.

13 Q And you said you were using that term colloquially; is
14 that right?

09:27AM 15 A I'm sorry?

16 Q You're using it colloquially?

17 A Correct. I use it much as if you and I were reading a
18 magazine and there were pie charts or bell curves in the story,
19 just to try to get a visual picture of what we're talking
09:27AM 20 about.

21 Q You said that you took Statistics 1 in college?

22 A I did.

23 Q So you understand, then, sir, that a bell curve is a
24 specific type of a statistical distribution; right?

09:27AM 25 A I do.

1 Q And in the middle of the bell curve there's an average;
2 is that right?

3 A I'm sorry?

4 Q There's an average that falls in the middle of the bell
09:27AM 5 curve?

6 A A mean, yes.

7 Q A mean?

8 A We use the word "mean."

9 Q And there's a concept called standard deviation?

09:28AM 10 A There is.

11 Q And can you describe what that is.

12 A Well, it's the amount of error that's statistically
13 determined that's likely in describing the average that would
14 be a deviation from that number .3 percent, .5 percent, that
09:28AM 15 sort of thing. It is a term that I've run into all the time
16 but have never really used.

17 Q And there's also the concept of variance; right?

18 A There's what?

19 Q The concept of variance.

09:28AM 20 A I don't know it offhand. I know what the word means.
21 Things vary from this to that, but I don't know the concept or
22 remember it.

23 Q I'm just going to put this up on the screen. Do you have
24 that in front of you on the screen? Can you see that on your
09:28AM 25 screen?

1 A I see the screen.

2 Q Okay. And so I'll represent to you that I actually got
3 this from Wikipedia this morning, but this is charting out
4 different types of bell curves. Do you see that there?

09:29AM 5 A I do.

6 Q And the difference in these bell curves, the shape of the
7 bell curve is because there's a variance?

8 A I'll have to accept that. You're already ahead of me. I
9 see all the standard deviation numbers on the sides and -- but
09:29AM 10 again, you're taking me into the expertise that I don't have.

11 I'll accept that those are different types of bell curves
12 because certainly the picture is different. And I don't know
13 the word "variance" as it applies. I don't see it here.

14 Q Well, sir, the -- this up here --

09:29AM 15 A I see that.

16 Q -- this number, so that symbol there is for the standard
17 distribution. And when you square it, that's the variance
18 number. So these are just -- these are applying bell curves
19 with different variances. Do you see that?

09:29AM 20 A I do.

21 Q And you see how the shape of the bell curves are
22 different?

23 A I do.

24 Q And so you haven't done a statistical analysis of the
09:29AM 25 interviews that you've done to determine which shape of the

1 bell curve might apply to your analyses?

2 A Correct.

3 Q And now when you talk about standard deviation, we're
4 talking about how far away from the mean somebody would be;
09:30AM 5 right?

6 MR. SCOTT: I'll just object as relevance and 403.

7 THE COURT: For purposes of this hearing, I'll
8 overrule it, but I understand your objection. Because
9 Mr. Marrett, he's -- when he used the word "bell curve" in his
09:30AM 10 opinion, it wasn't in the statistical sense, it was just trying
11 to communicate the concept of outliers and typically what the
12 range is. So I'm not sure the statistical examination is
13 relevant to be perfectly frank.

14 MR. MARRETT: I understand, Your Honor. I suppose
09:30AM 15 that's my point is that he's testified to this bell curve
16 distribution. That has a connotation -- statistical
17 connotation. And my understanding, there hasn't been any
18 statistical analysis of these users.

19 THE COURT: Your understanding is correct. And he
09:31AM 20 said that on direct as well as on cross. So now you're taking
21 him through statistical analysis that he didn't do, and that's
22 not what he was saying.

23 MR. MARRETT: Okay. I will move on, then.

24 Q Now, sir, as part of your testimony in this case, are you
09:31AM 25 going to be testifying about the indicia that might be present

1 if somebody is using methamphetamine personally versus somebody
2 who's selling or distributing methamphetamine?

3 A It's up to the attorney to ask me those questions. I
4 don't know.

09:32AM 5 Q Well, sir, are there indicia that are present when
6 somebody's distributing methamphetamine?

7 MR. SCOTT: I'll interpose, Your Honor. For what
8 it's worth, I will not elicit that testimony during his direct.
9 So if -- I don't object if Mr. Marrett wants to ask those
09:32AM 10 questions, but I can represent to the Court and government that
11 that will not be part of the expert opinion that I'll be
12 offering. I'm simply offering the amount of daily usage and
13 leaving it at that.

14 THE COURT: You have that representation.

09:32AM 15 MR. MARRETT: Well, I do want to ask a couple more
16 questions about this just for the purposes of this hearing.

17 Q Because sir, when you say that somebody uses a gram a day
18 or three to five grams a day, you're doing that based on an
19 interview that you've done with that person; right?

09:32AM 20 A Correct.

21 Q And so everybody that you've interviewed, they're
22 different. They use different amounts of methamphetamine;
23 right?

24 A Correct.

09:33AM 25 Q And somebody who's using a smaller amount of

1 methamphetamine -- strike that.

2 In a given case, whether a person -- if you don't know by
3 having interviewed the person what their daily use is, are
4 there indicia that you would look to to determine whether
09:33AM 5 somebody has a quantity of methamphetamine for personal use or
6 sales?

7 MR. SCOTT: Object as vague and also relevance.

8 THE COURT: Do you understand the question?

9 THE WITNESS: No. Could you repeat it, please.

09:33AM 10 MR. MARRETT: I'll break it down.

11 Q Sir, have you interviewed the defendant in this case?

12 A I have not.

13 Q So you haven't done the hour-and-a-half interview like
14 you do with other individuals in your program?

09:33AM 15 A Correct.

16 Q And so without having interviewed the defendant, do you
17 know anything about the defendant's use habits?

18 A I do not.

19 Q And in a given case, if there's a quantity of
09:34AM 20 methamphetamine and you don't know the person's use habits, are
21 there indicia that you would look to to determine whether that
22 quantity is for personal use or distribution?

23 MR. SCOTT: I'm going to object because that's not
24 the opinions being offered.

09:34AM 25 THE COURT: Overruled for purposes of this hearing.

1 THE WITNESS: So the last question was in a given
2 case if I haven't interviewed -- please repeat. I'm sorry.

3 Q BY MR. MARRETT: Sure. So in a given case, if you
4 haven't interviewed an individual, so you don't know from their
09:34AM 5 own words how much they use in a day, are there indicia that
6 you can look towards, objective factors, to inform you as to
7 how much they're using or whether they're not using at all, but
8 selling?

9 A So if I'm up here testifying about intent to sell, for
09:35AM 10 example, I would be looking and would be able to find evidence,
11 let's say indicia, that might support a statement of quantity
12 of use. If I'm not testifying about that issue, I wouldn't be
13 concerned with indicia of sales. I wouldn't look into it.
14 Does that make sense? It would depend on what I'm here for, I
09:35AM 15 guess.

16 Q I understand.

17 And so I guess my question is, then, if you don't know
18 anything about this particular defendant, is there anything
19 you've looked at in this case to tell you how much the
09:35AM 20 defendant might be using on a daily basis?

21 A You mean about our defendant here?

22 Q About our defendant here.

23 A I'm sorry?

24 Q Yes, about this defendant.

09:35AM 25 A No, I know nothing.

1 Q And is there anything -- objective information you've
2 been provided by defense counsel that would provide a basis for
3 your opinion as to how much this particular defendant might be
4 using in a day?

09:36AM 5 A Nothing --

6 MR. SCOTT: I'll just object. That misstates the
7 opinion, the premise of the question.

8 THE COURT: Sustained to the question, but I believe
9 he answered it. He said "nothing."

09:36AM 10 Q BY MR. MARRETT: Now somebody who's using three to five
11 grams a day, are they going to have physical manifestations of
12 their -- their drug addiction?

13 A At times they will. At times they will.

14 Q And what would those physical manifestations, if they
09:36AM 15 have them, what would they be?

16 A Breaking out sores, behavioral indications, various --
17 really -- this is interesting. In the past we would say --
18 there's a colloquial phrase, they're sucked up, very thin.

19 More and more of the clients that I'm seeing today are eating
09:37AM 20 with this current methamphetamine that comes in from Mexico.

21 So weight, various appearances. There's a phrase called "meth
22 mouth" where the teeth -- the methamphetamine prevents the
23 uptake of calcium into the body. And for some, maybe ten
24 percent causes rapid deterioration of enamel. So there is --

09:37AM 25 and I mentioned sores, breaking out. And jittery behavior,

1 gnashing of the teeth back and fourth called bruxism. Those
2 could be -- but many who use that quantity do not display any
3 symptoms at all physically that you would observe.

4 Q How about somebody using sort of the extreme, the half
09:37AM 5 ounce a day, are they exhibiting all those objective physical
6 manifestations?

7 A Not all of them, no. Unbelievably the few that have
8 actually told me one ounce did not display anything other than
9 fidgety behavior, I would say. None of those -- there's only a
09:38AM 10 few that had the sores that I'm referring to. There's been a
11 few, though, that do display them. So again, we're all
12 different, so it's hard to pin it down to any one particular
13 type of display of noticeable symptomology.

14 Q And have you reviewed the defendant's medical file or
09:38AM 15 anything to inform you as to whether he's ever displayed those
16 physical manifestations?

17 A I have not.

18 Q Now when you talk with the folks that you interview about
19 their use patterns, do you talk to them about how many days in
09:39AM 20 a row they might be using?

21 A Yes.

22 Q And so somebody using one gram a day or at least in sort
23 of the middle of your bell curve analysis, are they all using a
24 gram a day, or are some of them using a gram on Monday and then
09:39AM 25 not using again until the weekend?

1 A Well, those folks in the middle tend to be regular users,
2 virtually habitual users. So they tend to be daily consumers
3 of the drug. But they also will take a weekend off, or there's
4 a few that only do it on the weekends but still come under the
09:40AM 5 understanding of a regular habitual user where the job keeps
6 them from using, or family. But then there's a two- or
7 three-day period where they don't -- where they do use and
8 don't sleep at all going to a run, as we say.

9 Q And how about people sort of on the other end of the bell
09:40AM 10 curve, the people towards the party hit, do they have a
11 different use habit?

12 A Yes.

13 Q And what is their use habit?

14 A Occasional, serendipital (sic). There happens to be
09:40AM 15 somewhere where there's drugs where they don't buy it, that
16 sort of thing. In other words, they're not keeping it at home.
17 And what happens, of course, is there's a progression as comes
18 with all drugs, and they begin joining the regular users
19 typically.

09:41AM 20 Q And in your analysis of what the average user is, have
21 you documented or recorded how many of the people are daily
22 users versus the weekend users?

23 A No. Not beyond my own observations and notes to myself
24 about what's been happening over the years. Plus observing my
09:41AM 25 own using experience.

1 Q And in your own using experience, that's part of the
2 basis for your testimony; is that right?

3 A That's part -- yes.

4 Q And what was your experience, were you using daily?

09:41AM 5 A No.

6 Q What was your use pattern?

7 A I was a little bit unusual, especially back then.

8 Typically I would purchase an ounce at a time. And the day I
9 purchased it, I would use for the next few days, three, four

09:41AM 10 days. And I would use, as I recall dimly, two, three grams a
11 day, and then I'd put it away and I wouldn't touch it for two,
12 three weeks. Then I'd do it again until it was gone. So I had
13 this very strange control. I was able to stop. And that was
14 my experience with that drug in the 24 years that I did that or

09:42AM 15 21 years that I did that drug. It remained that way up until
16 the last four years, and then it was more daily. It was daily.

17 Q Now when you talk to people about their use habits, do
18 you also talk to them about their habits of where they keep
19 their drugs, where they store them or how much they carry on
09:43AM 20 them?

21 A Only if it's relevant it comes up. I mean, there's three
22 things you mentioned. I do ask them if they travel with it or
23 if they keep it in a safe place and use it only at home or at
24 someplace that they use. Those specific questions, we're more
09:43AM 25 concerned with how much they use, how they use it, how often

1 they use it. Those are the basic questions. And I don't ask
2 them where they get it. That's not my job. But it does come
3 up quite often, especially now. I'm in San Diego County, and
4 we're right on the border. So that proximity aspect comes up
09:43AM 5 all the time offered by the client.

6 Q So the person using a gram a day, when you've asked them
7 whether they travel with it or they store it, what is the
8 typical response?

9 A What is the question?

09:44AM 10 Q For the person who's your average user using a gram a
11 day, when you've interviewed those folks and ask them whether
12 they travel with it or how they store it, what has been their
13 typical response?

14 A I don't think I've ever asked anybody how you store it.
09:44AM 15 You mean like in a jar or a can or -- but in any case, aside
16 from that, the answers are varied as there are people in terms
17 of the answer, for example, "Do you travel?" or "Do you carry
18 it with you?" Some do, some don't. And the one-gram-a-day
19 person, they don't tend to carry it with them. But the average
09:44AM 20 user today is probably a little greater than one gram a day.

21 Q And does that person carry it with them, the person who's
22 using more than one gram a day?

23 A The more they use, the more likely they are to carry the
24 drug, yes.

09:45AM 25 MR. MARRETT: Can I just have a minute, Your Honor?

1 THE COURT: You may.

2 **(Counsel conferred off the record.)**

3 THE COURT: Mr. Fayer, while we're waiting, what is
4 the shelf life for meth?

09:45AM 5 THE WITNESS: In my opinion?

6 THE COURT: Yes.

7 THE WITNESS: Lifetime. Doesn't go bad. And if it
8 does, you just do a little bit more, but it doesn't disappear
9 at all.

09:46AM 10 MR. MARRETT: I have nothing further, Your Honor.

11 THE COURT: Very well.

12 Anything further?

13 MR. SCOTT: No, sir.

14 THE COURT: Sir, you can step down. I appreciate
09:46AM 15 your time.

16 THE WITNESS: Thank you, sir.

17 THE COURT: Good morning, Agent. Would you please
18 come forward. Stand right by the court reporter. We're going
19 to have you take an oath.

09:47AM 20 **STEVEN PARIS, PLAINTIFF'S WITNESS, WAS SWORN**

21 THE COURTROOM DEPUTY: Please state your full name
22 and spell your last name for the record.

23 THE WITNESS: Steven, S-t-e-v-e-n, Paris, P-a-r-i-s.

24 THE COURT: Mr. Marrett, as it was for Mr. Fayer, if
09:47AM 25 you want to lead, just try to get to the opinions that you

1 propose to offer at trial. I think that would be more helpful
2 than just a little few questions about his experience.

3 MR. MARRETT: Sure. Thank you, Your Honor.

4 **DIRECT EXAMINATION**

09:47AM 5 BY MR. MARRETT:

6 Q Special Agent Paris, in a given case, when you're
7 analyzing the evidence, are there indicia that you look towards
8 to see whether a particular quantity of methamphetamine is for
9 distribution or for personal use?

09:48AM 10 A Yes.

11 Q And what are some of those indicia?

12 A Well, there's some quantities that are obviously not for
13 personal use, but in quantities that could go either way. I
14 look at the totality of the circumstances. So if they were
09:48AM 15 packaged in a bunch of individual quantities, if there's
16 similar quantities, that indicates they're for sale, if there's
17 scales, packaging materials. As opposed to personal use, I
18 would expect to find pipes, needles, razor blades, items that
19 indicate personal use.

09:48AM 20 Q And what is the -- sorry. Strike that.

21 Within the scale of drug distribution from a user all the
22 way up to a wholesaler, what are some of the different roles
23 that are played?

24 A Well, it could be multiple roles. I mean, the drugs are
09:48AM 25 made somewhere, so there's wholesale quantities and

1 manufactured quantities, and then they have to be distributed
2 out to the street, and that could be in various levels.
3 There's bigger dealers that deal in multi-pound or kilogram
4 quantities. And large organizations such as that would have
09:49AM 5 potentially transporters, people that protect it, man stash
6 houses, all the way down to lookouts on the street. When
7 you're talking about street-level sales, less people are
8 involved to the point where it could be one person taking care
9 of multiple roles.

09:49AM 10 Q So for the person who's the street-level retailer, what's
11 the range of quantities that you would expect them to have with
12 them for purposes of distribution?

13 A Well, that could vary, certainly. The -- pretty much the
14 minimum sales quantity on the street is a tenth of a gram. So
09:49AM 15 something like an ounce quantity could be a sales use; that's
16 280 sales units right there.

17 Q Now, sir, you're a special agent with the DEA?

18 A Yes.

19 Q And how long have you been a special agent?

09:50AM 20 A Approximately 26 years.

21 Q And did you go to the DEA academy?

22 A I did.

23 Q And in addition to -- well, in the 26 years that you've
24 been a special agent, how many investigations or arrests have
09:50AM 25 you done?

1 A Well, on average, I'm involved in 80 to 100 investigations
2 a year; and arrests, approximately 100 persons a year. So
3 casewise, definitely more than 2,000. Investigations and
4 arrests, approximately 2600.

09:50AM 5 Q And approximately how many of those would you say have
6 been methamphetamine investigations?

7 A The large majority in this area, certainly methamphetamine
8 is one of our most commonly investigated drug crimes.

9 Q And through the course of those investigations, have you
09:51AM 10 interviewed witnesses?

11 A Yes.

12 Q And have you interviewed the arrestees?

13 A Yes.

14 Q Have you interviewed cooperators?

09:51AM 15 A Yes.

16 Q Have you interviewed confidential informants?

17 A Yes.

18 Q Have you done surveillance operations?

19 A Yes.

09:51AM 20 Q Hand-to-hand transactions?

21 A Yes, I have.

22 Q Have you spoken with other law enforcement about
23 methamphetamine distribution cases?

24 A Yes.

09:51AM 25 Q And through those interviews and conversations, have you

1 spoken with others or the people who are using about their use
2 habits?

3 A Yes.

4 Q Have you also spoken with them about their distribution,
09:51AM 5 how they distribute their drugs?

6 A Yes.

7 Q Have you also received any additional training or
8 certifications relating to methamphetamine?

9 A Yes.

09:51AM 10 Q And what would those be?

11 A In addition to attending the DEA academy, which obviously
12 is focused on drug law enforcement, I was also selected to
13 attend a clandestine laboratory investigator school back in the
14 early '90s. Meth labs were prevalent in this area, and meth
09:52AM 15 lab or clandestine laboratory investigator school specifically
16 had to do with manufacture and distribution of methamphetamine
17 to the point where we learned how to make meth under the guide
18 of a DEA chemist. There's various methods in materials that
19 can be used.

09:52AM 20 And, of course, over the 26 years we receive in-service
21 training, attend training at various organizations such as the
22 California Narcotic Officers' Association has conferences, and
23 there's numerous organizations of that type, the California --
24 I'm sorry -- the International Narcotic Interdiction --
09:52AM 25 officers -- Association. There's constantly updates, new

1 methods, training bulletins that are frequently put out by my
2 organization.

3 Q Do you also teach and train others?

4 A I do.

09:53AM 5 Q And for what organizations do you teach or train?

6 A DEA puts on a variety of schools. They put on a basic
7 narcotic officers school. They put on schools for task force
8 officers, a bunch of different kinds of training. I have
9 taught for DEA for numerous years and have taught for outside
09:53AM 10 organizations such as the California Narcotic Officers'
11 Association in the past as well.

12 Q Sir, as a special agent with the DEA, are you familiar
13 with the drug schedules?

14 A Yes.

09:53AM 15 Q And within which schedule does methamphetamine fall?

16 A Schedule II.

17 Q And what does it mean to be a Schedule II controlled
18 substance?

19 A Means that there are some medical uses for that type of
09:53AM 20 drug.

21 Q And as a drug with some medical indication, does the DEA
22 or medical community subscribe a dosage amount to
23 methamphetamine?

24 A Yes.

09:54AM 25 Q And what is that amount?

1 A Well, I don't know about methamphetamine specifically, but
2 amphetamine derivatives. So one of the most common would be
3 Adderall. Adderall is an amphetamine-based product. The
4 dosage unit is approximately five milligrams.

09:54AM 5 Q Okay. Sir, when you were testifying about sort of the
6 small street distribution quantity of a tenth of a gram, is
7 that opinion at all based on what the medical community or DEA
8 considers to be a dosage amount?

9 A No.

09:54AM 10 Q Is the tenth of a gram distribution quantity that you
11 talked about based on your training and experience?

12 A Yes.

13 MR. MARRETT: I have nothing further, Your Honor.

14 THE COURT: All right. Cross-examine, Mr. Scott.

09:54AM 15 MR. SCOTT: Thank you, Your Honor.

16 **CROSS-EXAMINATION**

17 BY MR. SCOTT:

18 Q Good morning.

19 A Good morning.

09:54AM 20 Q So I'm trying to get a sense of what opinions you've been
21 asked to share with the jury in this case.

22 A Sure.

23 Q I heard the prosecutor ask you some questions this
24 morning about what you look to in terms of indicia, either of
09:55AM 25 sales or personal use; is that correct?

1 A Yes.

2 Q And you mentioned that if you're looking at potentially a
3 sales case, you might see scales, for example?

4 A Yes. It's common.

09:55AM 5 Q Or individual packaging, individual bindles, things of
6 that nature?

7 A That is also common.

8 Q Okay. So I'll just ask you, have you been asked or are
9 you planning to give opinions of that nature in this case?

09:55AM 10 A I'm sorry. I don't understand your question exactly.

11 Q Are you going to offer opinions like that in this case?

12 A If I'm asked to. I mean, I'll answer the questions that I
13 am asked. I do not know what those questions are going to be
14 specifically.

09:55AM 15 Q Well, you were just asked about various roles in a
16 particular -- I guess these are roles in a drug-trafficking
17 organization; is that correct?

18 A Sure.

19 Q Does that mean "yes"?

09:55AM 20 A Yes.

21 Q All right. And to your knowledge, have you discussed
22 discussing roles like that with the jury in this case?

23 A I do not specifically know anything about this case other
24 than just general opinions that I'm going to be asked.

09:56AM 25 Q Okay. So I got pressed on this a little bit. What are

1 the opinions that you're offering in this case?

2 A As far as I know, just general drug use or distribution,
3 methods and commonalities.

4 Q And specifically what are those commonalities and methods
09:56AM 5 that you're going to be opining in this case?

6 A I don't really know what to tell you. I don't know the
7 questions.

8 Q Well, okay. Do you know whether you're going to be asked
9 if the amount of methamphetamine in this case was for personal
09:57AM 10 use or was for distribution?

11 A I'm assuming I will be asked to offer an opinion on that.
12 But again, I do not know if that is the question that will be
13 asked.

14 Q All right. Have you received any instruction on what you
09:57AM 15 are not going to be permitted to testify about?

16 A No.

17 Q Okay. You were -- you were asked about an opinion about
18 a sales unit.

19 A Yes.

09:57AM 20 Q And what is that opinion?

21 A Well, a tenth of a gram is -- tenth of a gram is pretty
22 much the smallest sales unit, and that is not based so much on
23 my opinion as it's documented, meaning various law enforcement
24 organizations, including mine, track and keep data on different
09:57AM 25 prices, impurities of narcotics for numerous reasons. One

1 would be for undercover operations to know about what the
2 approximate sales -- or I should say price impurity is at
3 certain levels. But they also keep track of it for purposes of
4 is it supply and demand? Is it going up and down? Are they
09:58AM 5 making a difference in certain areas? So a tenth of a gram is
6 the minimal sales unit that is tracked.

7 Q Let me stop you there. Did I understand you to say that
8 it's -- that you yourself don't so much have an opinion on what
9 a minimum sales unit is? This is more what either the DEA or
09:58AM 10 other narcotics law enforcement agencies say it is?

11 A No, I'm saying that a tenth of a gram is a commonly known
12 minimum sales quantity.

13 Q All right. So when you were talking about DEA tracking
14 it and other organizations tracking it, you're talking about
09:58AM 15 what?

16 A I'm talking about methamphetamine.

17 Q Well, no. My question is what are the sources or this
18 data that you're describing.

19 A Oh, okay. Well, undercover operations -- undercover
09:59AM 20 officers negotiate or actually make undercover purchases.

21 Items or quantities that are seized, they record what the
22 average price and purity is in certain areas. And specifically
23 there's even -- they send officers out to make buys in certain
24 areas just to see what the price and purity is in those areas.

09:59AM 25 Q So is this data written down somewhere? Is there like a,

1 you know, a newsletter that you get on a monthly basis --

2 A There is a database that --

3 Q Excuse me, let me ask the question.

4 A Oh, sorry.

09:59AM 5 Q Is there a quarterly journal? Or what source material
6 are you describing for this minimum sales dosage?

7 A Well, there are several intelligence databases that can be
8 consulted. Certainly DEA has their own. And then there is a
9 regional clearinghouse that keeps data that's run by the State.
09:59AM 10 It records data in the counties in this Los Angeles area which
11 would include Orange, Riverside and San Bernardino, in addition
12 to Los Angeles County.

13 Q How often -- how many times in your career have you seen
14 a tenth of a milligram individual bindles packaged up for sale?

10:00AM 15 A Tenth of a milligram or tenth of a gram?

16 Q I'm sorry, tenth of a gram.

17 A I have seen it especially when I worked gangs,
18 specifically in crack cocaine-type deals. It was sold on the
19 street in that quantity, and they sold methamphetamine in those
10:00AM 20 quantities as well.

21 Q All right. So my question was how frequently in
22 methamphetamine context, which is what we're talking about
23 here, have you actually seen a tenth of a gram individual
24 bindles?

10:00AM 25 A I've certainly seen it. I wouldn't say I see it often

1 mostly because working for the organization that I do, we deal
2 in high-level-type quantities. So during search warrants or
3 other enforcement activities such as that, I've seen it. I
4 don't see it often because we deal in multi-pound quantities
10:01AM 5 most frequently.

6 Q So what is the more frequent sales of units that you're
7 familiar with?

8 A Well, it depends on what we're talking about. Because
9 again, at my level, we're talking -- or we're negotiating as
10:01AM 10 dealers, as mid-level dealers to buy larger quantities.

11 Q Let's assume street-level dealers.

12 A Yeah, it varies. I mean, I've worked cases where they
13 have casitas, both in Orange County and Los Angeles County,
14 casitas being houses frequently in residential neighborhoods
10:01AM 15 where there's gambling, prostitution. And within those
16 residences they're selling small quantities to people that are
17 customers of gambling and prostitution, and they're sold in
18 small quantities like that.

19 So, I mean, working for the DEA, we work only narcotics
10:02AM 20 cases. And there's a wide range in variety of different sales
21 quantities that can occur. And I would say that those would
22 be -- you know, I'd have to know the specifics -- more
23 specifics of the case. And that's why I look for totality of
24 the circumstances when giving an opinion. Because something
10:02AM 25 like a gram could certainly be use quantity, it could also be a

1 sales quantity.

2 Q Okay. Well, you said a lot of things there, but the
3 question that I had -- first we established in your experience
4 is that a tenth of a gram is in actuality a relatively rare
10:02AM 5 amount of sales that you've seen; right? You haven't seen that
6 on a day-in, day-out basis, people actually selling in
7 tenth-of-a-gram bundles? Would you agree with that?

8 A I would say that it's not uncommon. I don't see it every
9 day. But certainly tenth of a gram is a sales quantity.

10:03AM 10 Eighth of an ounce, 16th of an ounce, those are all common
11 street-level quantities.

12 Q So we're getting closer to the question than I first
13 asked here. Let's set aside the casita, which is where
14 somebody is buying a line at a time at a bar or something like
10:03AM 15 that. Is there sort of a heartland in your experience of what
16 a normal sales unit is on the street?

17 A I would say a 16th of a gram, a teenager in street language,
18 or an eighth -- 16th of an ounce or eighth of an ounce, 8-ball
19 in streetland, which are two very common sales quantities.

10:03AM 20 Q Not so much the --

21 A Not as often. I mean, that is -- yes.

22 Q Okay. Now are you going to be offering opinions in this
23 trial about what constitutes a common personal use amount of
24 methamphetamine?

10:04AM 25 A I do not know that.

1 MR. SCOTT: Can we get some guidance?

2 THE COURT: I assume your direct examination, those
3 were your main opinions you were going to be asking about?

4 MR. MARRETT: That's right, Your Honor. The
10:04AM 5 examination is going to focus on the indicia -- the objective
6 manifestations or indicia of sales versus personal use as well
7 as sort of the range that is seen in street-level distribution.

8 MR. SCOTT: So we're not going to be opining on how
9 many grams a person might use in a given day or anything like
10:04AM 10 that?

11 MR. MARRETT: I mean, that could be part of the
12 testimony, but that's not what I understood the purpose of this
13 *Daubert* hearing was to establish.

14 MR. SCOTT: I guess I can just keep going. Feels
10:04AM 15 like we have a little --

16 THE COURT: Keep going, but candidly I'm getting a
17 little frustrated with both sides. What I've heard on -- at
18 least on direct is totally appropriate. I feel like both sides
19 are trying to do civil discovery here. This was just a *Daubert*
10:05AM 20 hearing to whether this was reliable testimony and helpful to
21 the trier of fact. And, you know, in fairness to the system,
22 to the witnesses, we're not here to do a dry run of either
23 side's experts. And I haven't heard anything from Agent Paris
24 or from Mr. Fayer that is controversial or -- I'm wondering why
10:05AM 25 am I here? Why am I listening to this?

1 MR. MARRETT: And Your Honor, I think during my
2 cross, I tried to explore the bell curve area. And I think we
3 can argue that. I think I understand where the Court's going
4 with that. My understanding of the defense's objection to
10:05AM 5 Special Agent Paris's testimony has to do with the issue of
6 medical dosage quantity.

7 And during direct exam, we established that that dosage
8 quantity doesn't form the basis of his opinions as to what
9 street distribution quantities are or what those indicia might
10:06AM 10 be. So I'm not sure what remaining objection the defense has
11 other than to try to explore the special agent's testimony in
12 sort of a dry run.

13 THE COURT: Mr. Scott, why don't you just ask your
14 questions. But if you can keep in mind what I said. This is a
10:06AM 15 *Daubert* hearing, it's not civil discovery.

16 MR. SCOTT: Very good.

17 Q All right. Do you have an opinion on what a personal --
18 a personal dosage unit is?

19 A I would say that it varies depending on the user and the
10:06AM 20 purity of the methamphetamine.

21 Q All right. Would you agree that the -- okay. So it's
22 contextual. It depends on the person consuming the
23 methamphetamine?

24 A Depends on the person, depend on the purity. Can even
10:07AM 25 depend on the method of use.

1 Q All right. And you said as part of the basis of your
2 opinion is that you've interviewed people about their drug use;
3 is that right?

4 A Yes.

10:07AM 5 Q Now do I assume correctly that you interviewing people is
6 in the context of drug trafficking investigations?

7 A Well, there's a large variety of people I interview.
8 Certainly we interview informants, but also we interview people
9 that we arrest. We go to search warrants and interview people
10:07AM 10 that are present that might not necessarily get arrested. And
11 some of them could be customers of the drug locations that
12 we're going to.

13 Q But they're all in the context of some sort of drug
14 trafficking investigation typically; right?

10:07AM 15 A Sure.

16 Q I mean, you're not taking social history of people to
17 treat them for substance abuse?

18 A That is correct, yes.

19 Q Okay. You know, that's not -- obviously your job is to
10:08AM 20 try to get drug traffickers?

21 A Yes.

22 Q You do know from your interviews of people that
23 oftentimes people don't just use methamphetamine one time a
24 day; right?

10:08AM 25 A Yes.

1 Q Oftentimes, especially for regular users, they use the
2 drug multiple times in a day; right?

3 A That could be the case, yes.

4 Q And many people unfortunately use methamphetamine every
10:08AM 5 day; is that true?

6 A I do know that that occurs, yes.

7 Q And so do you have any opinion on sort of a normal
8 one-time use for a regular methamphetamine user?

9 A Again, I would say that it varies depending on the user
10:08AM 10 and what their tolerances are. I could offer you some
11 opinions, but it would definitely vary from user to user.

12 Q So to your knowledge, anyway, you're not planning on
13 offering any specific opinions in that regard?

14 A Again, I don't know what questions I'll be asked. Nobody
10:09AM 15 gave me a list or a list of questions. I was just asked to
16 answer questions based on my training and experience.

17 Q All right. Well, if Mr. Marrett does ask you, "What in
18 your experience is sort of normal personal use amount?" what
19 are you going to say?

10:09AM 20 A I would say that it depends on, again, the user, that
21 people have different tolerances, different methamphetamine
22 experience. First-time user I would say would not be uncommon
23 for a tenth of a gram to be quartered. So split in four. And
24 that tenth of a gram might last them two to four uses. Might
10:09AM 25 last one to two people two to four uses. Somebody with a

1 frequent habit might take the tenth of a gram.

2 And what I'm told is common is to smoke it in 20th of a
3 gram. Depending, again, if we're talking smoking, if we're
4 talking ingesting, injecting, wouldn't be uncommon for them to
10:10AM 5 use a 20th of a gram at a time and maybe use a couple times a
6 day, like you say. But sometimes depending on the purity of
7 the methamphetamine, the effects can last anywhere from 8 to 12
8 to 18 hours a day.

9 So it depends on how often that they would re-up or take
10:10AM 10 another hit. But I am told that anywhere from three-tenths to
11 half a gram a day for frequent users is -- is a common amount
12 for somebody who actually has a tolerance for it. And that a
13 gram would last them three to four days.

14 Q That's what you're told?

10:10AM 15 A During interviews, that is the most common recited
16 quantities.

17 Q Is there any other bases of those opinions other than
18 these interviews that you assert?

19 A That's just what -- that's just what we find in the
10:11AM 20 majority of people that I talk to. And again, it depends on
21 how often. I'm not, as you said, involved in clinical or
22 rehabilitation. The users that I interview, that's what they
23 say.

24 Q When's the last time somebody told you that they smoked a
10:11AM 25 20th of a gram of methamphetamine?

1 A Well, we've been -- again, we do a lot of search warrants
2 at various locations that we interview the people that are
3 there. Depending on not only their use habits, but also the
4 amount of -- there's a lot of individuals that frequent these
10:11AM 5 places that not only are strung out, so to speak, but they have
6 limited amount of funds. And for them to be able to get a 10th
7 of a gram hit is what they're there for.

8 Q When's the last time somebody told you they smoked a 20th
9 of a gram of methamphetamine?

10:12AM 10 A I would say it was within the last year.

11 Q All right. Do you remember the case or the situation?

12 A No. We do a lot of cases every day.

13 Q Okay. So one person told you that within the last year,
14 is that what you're saying?

10:12AM 15 A I'm saying that I was -- you asked me when was the last
16 time I was told, and I would say within the last year.

17 Q Can you remember the last time before that?

18 A I don't know.

19 MR. SCOTT: Okay. All right. Well, I guess that's
10:12AM 20 all I have, Your Honor.

21 THE COURT: Very well.

22 Anything further?

23 MR. MARRETT: Nothing further, Your Honor.

24 THE COURT: Agent, you can step down. Appreciate
10:12AM 25 your time, sir.

1 All right. With respect to Mr. Fayer, I believe his
2 testimony is appropriate. He has extensive 31 years of
3 experience in drug addiction treatment and counseling. I
4 anticipate he's going to be asked questions about meth usage,
10:13AM 5 how it's typically ingested, how often it's typically ingested
6 and the quantities typically ingested. At least that was the
7 focus of the examination I heard today, and that's totally
8 appropriate and, I think, helpful to the trier of fact on the
9 critical issue in this case, whether the meth that was seized
10:13AM 10 was for personal use or distribution.

11 Similarly, I feel Agent Paris's testimony is entirely
12 appropriate. His testimony will be limited to drug
13 distribution practices and methods including packaging, other
14 indicia of distribution, and then the quantities typically
10:14AM 15 denied or maintained for personal use. His testimony on those
16 issues is based on his extensive, 25 years of experience with
17 the DEA, participating in over a thousand investigations and
18 interviewing hundreds of suspects and cooperating sources.

19 Again, his testimony will be helpful to the trier of fact
10:14AM 20 in determining the critical issue in this case, whether the
21 meth seized in this case was for Mr. Govey's personal use or
22 for his distribution to others. Again, I want to reiterate
23 though, he should not render any opinion or be asked any
24 question whether the meth in this case was for personal use or
10:14AM 25 distribution, nor should he be asked a question referring to

1 the meth or other evidence seized in this case because I don't
2 believe that testimony is helpful to the trier of fact and that
3 it will usurp the jury's function of determining Mr. Govey's
4 guilt. Anything further we need to discuss?

10:15AM 5 MR. MARRETT: Your Honor, just to make sure that I
6 instruct the witnesses appropriately as to the scope of the
7 expert testimony, I want to make sure I understand the Court's
8 ruling clearly.

9 No. 1, Special Agent Paris or the defense expert can't
10 opine that the 44.4 grams of methamphetamine in this case, what
11 their opinion is as to what that was for?

12 THE COURT: Correct.

13 MR. MARRETT: And likewise couldn't be asked a
14 hypothetical question about a similar quantity?

10:15AM 15 THE COURT: Correct.

16 MR. MARRETT: And then as far as the actual evidence
17 seized in this case and my understanding from the Court's
18 ruling is that the experts can testify generally as to, for
19 example, what a pay/owe sheet is and why that's important to
10:15AM 20 them in their assessment of a case?

21 THE COURT: Yes.

22 MR. MARRETT: But cannot -- I can't put that pay/owe
23 sheet from -- that was seized in this case in front of them and
24 have them testify about it?

10:16AM 25 THE COURT: Correct.

1 MR. MARRETT: I think that clarifies. Thank you,
2 Your Honor.

3 THE COURT: All right. Anything further, Mr. Scott?

4 MR. SCOTT: I guess -- and I'm mindful of what the
10:16AM 5 Court said, and I feel a certain frustration too, but for
6 different reasons, so I appreciate the Court's patience. I
7 just want to say the source of the frustration is that you kind
8 of have to know what the precise opinions are in order to, in
9 my mind anyway, conduct an efficient and reasonable *Daubert*
10:16AM 10 hearing. It's sort of concerning to me that apparently even
11 the agent doesn't know what he's going to be opining about.

12 You can tell by the way he sort of pivots into long
13 answers that it's not going to surprise me at all if he starts
14 offering long opinions that haven't been vetted this morning.
10:16AM 15 The first time anyone ever said "pay/owe sheet" was Mr. Marrett
16 here at the lectern today. That would have been a nice thing
17 to ask the agent about, his background, his experience with
18 pay/owe sheets.

19 So I guess I just want to offer a general objection that
10:17AM 20 it's still not particularly clear to me what opinions this man
21 is going to be offering in this case against Mr. Govey. If
22 it's simply, you know, about packaging and scales and this and
23 that, I agree, fair, and so be it.

24 You know, I guess if he talks about street-level sales
10:17AM 25 versus people crossing the border, I don't know that it's

1 relevant, but I don't object. Beyond that, I don't know what
2 other opinions he's going to offer, and I don't know that the
3 government's laid a foundation for them.

4 THE COURT: Well, I do believe that the disclosure,
10:17AM 5 especially after the hearing we had today, there's been more
6 than enough. And I know you, you're very skilled, you know the
7 questions you're going to ask. It would have been nice, I
8 guess, if the pay/owe sheet question was asked, but I don't see
9 that as controversial or prejudicial. I know you'll be able to
10:17AM 10 deal with that. And that is under the general category of
11 indicia of drug distribution activity. It's very common in
12 distribution cases.

13 So again, I think the parameters of what's fair and what's
14 not fair are pretty clear, at least they are in my mind. And
10:18AM 15 I'm going to expect both sides to ask their questions within
16 those parameters. And if it goes outside that, then I expect
17 an objection, not a speaking objection, to say "beyond the
18 scope," "irrelevant," and then I will rule accordingly if the
19 other side doesn't.

10:18AM 20 MR. SCOTT: Your Honor, to avoid speaking
21 objections, what I would intend to do, unless the Court would
22 like me to do it differently, is if I perceive that there are
23 opinions being offered that haven't been disclosed, that
24 haven't been approved in the context of a *Daubert* hearing, my
10:18AM 25 plan would be to say, "Objection. Rule 16. Scope." Something

1 like that. Something sort of cryptic. But the Rule 16 in
2 particular is kind of saying, you know, we haven't heard this
3 before, or this is new, undisclosed stuff. Unless the Court --

4 THE COURT: That's fine.

10:19AM 5 MR. SCOTT: Okay.

6 THE COURT: Again, my hope is we -- this was the
7 subject of a motion in limine. This was the subject of this
8 hearing. I sure hope we don't have that issue, then I would be
9 frustrated that we've truly wasted our time here.

10:19AM 10 Okay. So I think we have one final pretrial conference
11 next Friday. I'll look forward to that. I'll have the final
12 draft jury instructions for your final consideration. And if
13 there's any other issue we need to discuss, we can deal with it
14 then.

10:19AM 15 MR. SCOTT: One final thing I wanted to put on the
16 record, and I hope this isn't a warning of me whining about
17 things, but I feel I owe it to Mr. Govey to say for the record,
18 the continuance that was granted in this case --

19 THE COURT: Yes, sir.

10:20AM 20 MR. SCOTT: -- the four weeks was over our
21 objection, and we've made our record on that. I do want to say
22 for the record that since -- before the government filed that
23 motion asking for the continuance, and in that motion where
24 they said -- you know, represented that there was a team of a
10:20AM 25 dozen attorneys sort of poised to do this review, we have not

1 received a single additional page of discovery. I'm not asking
2 the Court to take action on that, I'm just saying for the
3 record that I have requested that whatever Department of
4 Justice files are being reviewed, that they be disclosed on a
10:20AM 5 rolling basis. And I just want to put that on the record that
6 we haven't received anything since before the date the
7 government moved to continue.

8 THE COURT: We'll see how the situation unfolds.

9 MR. MARRETT: And the -- I don't want to belabor the
10:20AM 10 point. Just to respond for the purposes of the record, Your
11 Honor, I can say that we've completed about 75 percent of our
12 sort of initial review and anticipate a production to the
13 defense in advance of the final pretrial conference next week.
14 And I anticipate it's going to be substantially less than the
10:21AM 15 25,000 records that we've been reviewing. I anticipate the
16 burden on the defense to go through is going to be relatively
17 minimal and moderate, and they should be able to get through
18 those documents, I anticipate.

19 THE COURT: I don't want to prejudge or speculate
10:21AM 20 about what it is. I sincerely hope that's not an extensive
21 document dump the day before the pretrial conference because I
22 imagine Mr. Scott's going to have a motion renewing his motion
23 which I denied without prejudice. So it is what it is. And
24 I'll look forward to seeing everybody next Friday.

10:21AM 25 MR. SCOTT: I agree it is what it is, and I would

1 just respectfully urge that if 75 percent of it is done, we
2 should be seeing about 75 percent of that fruit at this point
3 on a rolling basis. But again, I made my record. So thank
4 you, Your Honor.

10:22AM 5 THE COURT: Okay. All right.

6 THE COURTROOM DEPUTY: All rise.

7 **(Proceedings concluded at 10:22 a.m.)**

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